## Tekital Sdn Bhd v Sarina bt Kamaludin & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D22NCC-1019 OF 2010
NALLINI PATHMANATHAN JC
20 JANUARY 2012

*Tort — Conspiracy — Conspiracy by unlawful means — Plaintiff invested in company running automated car parks — Promised share of profits and other undertakings failed to materialise — Company eventually wound up — Assets and business of company siphoned off to other companies controlled by same individuals — Whether plaintiff suffered loss and damage as a result*

The plaintiff company, wholly owned by two Italian nationals, sued the defendants for fraud and for the tort of conspiracy to injure by unlawful means. The plaintiff had invested RM1.2m in a company known as Auto Parking Inc Sdn Bhd ('API') which was in the business of operating and managing automated car parks. In return, the plaintiff was given a 10% shareholding in API and a right to 10% share of API's profits periodically. The plaintiff was also assured its shares in API could be repurchased upon the close of the venture at RM7 per share and that in the event of default in payment of the profits or the venture failing, API would, on the plaintiff's demand, repurchase the plaintiff's 10% shareholding. Apart from a single payment of profits, no further payments were made to the plaintiff and neither were its shares in API repurchased. API, which once managed 16 car parks and its systems, was subsequently wound up. The plaintiff contended that from the time it was foreseen that API was becoming increasingly insolvent, the first, second and third defendants conspired to unlawfully strip, siphon off or remove the assets, business and operations of API and transfer them to the fourth, fifth and sixth defendants, which entities they were in control of variously as directors and/or shareholders, and through those companies carried on the very same business and operations which API had. The net effect of their actions was to deprive all creditors, including the plaintiff, recourse to the assets of API to make good the losses and damages they had suffered. The plaintiff sought a return of its RM1.2m working capital and an account of profits due to it from API since 2005.

**Held**, allowing the claim:

(1) The first, second and third defendants acted in concert to siphon off or transfer the assets and business of API to the fourth, fifth and sixth defendants which they controlled. API was in financial difficulties and on the point of liquidation when these businesses were transferred (see para 48).

(2) Proof of the agreement or combination between the first, second and third defendants to transfer the business and assets of API to the other defendants could be inferred from the net result of their concerted activities over the relevant period (see para 106).

(3) The unlawful actions of the defendants were clearly evident and apparent from the fact that assets of API were transferred out before and after the presentation of a winding up petition against it as well as during the winding up and thereafter, thereby diverting assets that should have been lawfully available for division and distribution between the general body of creditors (see para 107).

(4) The plaintiff had suffered loss and damage as API failed to pay the plaintiff the profits due to it from the year 2005 together with the return of the working capital of RM1.2m with interest despite demands to that effect (see para 112).

**[Bahasa Malaysia summary**

Syarikat plaintif, yang dimiliki secara keseluruhan oleh dua warganegara Itali, menyaman defendan-defendan untuk fraud dan untuk tort pengkomplotan untuk mencederakan melalui cara yang menyalahi undang-undang. Plaintif telah melabur sejumlah RM1.2 juta di dalam syarikat yang dikenali sebagai Auto Parking Inc Sdn Bhd ('API') yang mana adalah dalam perniagaan operasi dan menguruskan tempat letak kereta automatik. Dalam balasan, plaintif diberi pemegangan saham sebanyak 10% di dalam API dan hak kepada syer 10% daripada keuntungan API secara berkala. Plaintif juga diyakinkan yang syernya dalam API boleh dibeli semula atas penutupan usaha niaga pada RM7 sesaham dan jika ingkar dalam bayaran keuntungan atau kegagalan usaha niaga, API akan, atas permintaan plaintif, pembelian semula pemegangan saham plaintif sebanyak 10%. Selain daripada bayaran tunggal keuntungan, tiada bayaran selanjutnya dibuat kepada plaintif dan juga sahamnya dalam API tidak dibeli semula. API, yang mana pada satu ketika menguruskan 16 tempat kereta dan sistemnya, akhirnya digulung. Plaintif berhujah bahawa dari satu masa ke satu masa ia dapat diramalkan bahawa API telah bertambah menjadi tak solven, defendan-defendan pertama, kedua dan ketiga berkomplot dengan menyalahi undang-undang melucutkan, mengalihkan atau memindahkan aset, perniagaan dan operasi API dan memindahkannya kepada defendan-defendan keempat, kelima dan keenam yang mana entitinya dikawal oleh mereka sebagai pengarah-pengarah dan/atau pemegang-pemegang saham, dan melalui syarikat-syarikat tersebut menjalankan perniagaan dan operasi yang sama seperti yang dijalankan oleh API. Kesan jelas tindakan mereka adalah untuk menafikan kesemua pemiutang, termasuk plaintif, remedi kepada aset API adalah untuk mendapatkan pampasan dan kerugian yang dialami mereka. Plaintif memohon pengembalian modal kerjanya

sejumlah RM1.2 juta dan jumlah keuntungan yang patut dibayar kepadanya daripada API semenjak 2005.

**Diputuskan**, membenarkan tuntutan:

(1) Defendan-defendan pertama, kedua dan ketiga bertindak secara bersama untuk mengalihkan atau memindahkan aset dan perniagaan API kepada defendan-defendan keempat, kelima dan keenam yang dikawal oleh mereka. API berada dalam kerumitan wang dan berada pada tahap pembubaran apabila perniagaan-perniagaan ini dipindahkan (lihat perenggan 48).

(2) Bukti perjanjian tersebut atau penggabungan antara defendan-defendan pertama, kedua dan ketiga untuk menindahkan perniagaan dan aset API kepada defendan-defendan yang lain boleh disimpulkan daripada keputusan jelas aktiviti-aktiviti bersama mereka sepanjang tempoh yang berkenaan (lihat perenggan 106).

(3) Tindakan defendan-defendan yang menyalahi undang-undang jelas dan nyata daripada fakta bahawa aset API dipindahkan keluar sebelum dan selepas pengemukaan petisyen penggulungan terhadapnya dan juga semasa penggulungan dan selepasnya, oleh itu mengalihkan aset yang sepatutnya sedia ada dari segi undang-undang untuk pembahagian dan pengagihan antara badan am pemiutang-pemiutang (lihat perenggan 107).

(4) Plaintif telah mengalami kerugian dan ganti rugi memandangkan API gagal untuk membayar kepada plaintif keuntungan yang perlu dibayar kepadanya dari tahun 2005 bersama pengembalian modal kerja sejumlah RM1.2 juta bersama faedah walaupun permintaan-permintaan dibuat untuknya (lihat perenggan 112).]

**Notes**

For cases on conspiracy by unlawful means, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 74–75.

**Cases referred to**

*Kuwait Oil Tanker Co SAK and another v Al Bader and others* [2000] 2 All ER (Comm) 271, CA (refd)

*Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd* [2002] 4 SLR 537, HC (refd)

*Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR 80, HC (refd)

*Renault SA v Inokom Corp Sdn Bh & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (refd)

*Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR 451, HC (folld)

**Legislation referred to**

Companies Act 1965 ss 67, 219(2), 223, 233, 295
Companies Act 1965 [SG] s 76

*TH Liew (Lim Qi Si with him) (TH Liew & Partners) for the plaintiff.*
*DP Vijandran (DP Vijandaran) for the first, second and fourth defendants.*
*Moorthy (The Chambers of Moorthy & Partners) for the third and fifth defendants.*
*K Chandra (Arbain & Co) for the sixth defendant.*

**Nallini Pathmanathan JC:**

INTRODUCTION

**[1]** The plaintiff, Tekital Sdn Bhd, which is a company incorporated in Malaysia by two Italian nationals, namely one Carlo Allaria and one Penna Luciana, brings this action against the six defendants claiming that these defendants conspired to injure them, and perpetrated a fraud against them. In essence the plaintiff invested in a company known as Auto Parking Inc Sdn Bhd ('API') which is now in liquidation. API, a private limited company, was at all material times involved in the car park business, ie it conducted the business of operating and managing car parks. The plaintiff maintains that it made such investment premised on various misrepresentations made to Carlo Allaria and Penna Luciana on behalf of the plaintiff, by one Edison De' Cruz, on behalf of API. Edison De' Cruz is said to be the central character in a stable/group of companies including API and the Stess group of companies, which, it is contended he runs, operates and manages through the six defendants in this suit.

**[2]** Pursuant to an agreement dated 18 March 2004, the plaintiff paid a sum of RM1.2m by way of investment in API. The parties to this agreement were stated to be the plaintiff and API. However all monies paid pursuant to this agreement were paid in actuality to Stess Sdn Bhd and it was Stess Sdn Bhd that sold a 10% shareholding in API to the plaintiff. In short, in consideration of the payment of the sum of RM1.2m, the plaintiff became a 10% equity shareholder of API. Additionally the plaintiff became entitled to receive, under the terms of the agreement, a ten per cent share of the profits of API periodically.

**[3]** The plaintiff also contends that it was represented to Carlo Allaria that the plaintiff's shares in API would be repurchased upon the close of the venture at a cost of RM7 per share. It was however an express term of the agreement that in the event of any default in the payment of profits or the venture failing, API would, on demand from the plaintiff, repurchase the plaintiff's ten percent shareholding.

**[4]** The plaintiff received profits on one occasion after considerable prompting. After this however, these promised payments of profits were never made. Neither were the plaintiff's shares in API repurchased. The plaintiff maintains that it was cheated of its investment by Edison de' Cruz and his nominees, namely the first, second and third defendants. Attempts were made by the plaintiff to recoup his losses, inter alia, by filing a civil suit as well as lodging police reports which resulted in the institution of criminal proceedings. The plaintiff instituted a suit against Edison De' Cruz and API in D3–22–1492 of 2006 claiming, inter alia, the repurchase of the shares at RM7 per share and for an account of profits under the shareholder's agreement. The plaintiff has been granted judgment in terms of its claim.

**[5]** Then on 18 November 2009, API was wound up. Edison De' Cruz was adjudicated bankrupt.

**[6]** In the present suit the plaintiff contends that the six defendants in this suit conspired with each other and acted in concert so as to deny the plaintiff its legitimate claim for the repurchase of its investment in API and an account of profits since 2005. This, it is contended, was done by stripping or siphoning off the assets of API, namely the management of no less than 16 car parks and its systems, and transferring these 'assets' or 'businesses' to other corporate entities such as the fourth, fifth and sixth defendants immediately prior to or soon after API was wound up. Thereafter these entities, particularly the fourth defendant, Auto Parking (M) Sdn Bhd continued to operate these 16 car parks which were originally managed by API prior to its liquidation.

**[7]** As of April 2010, the plaintiff contends that the first and second defendants engineered matters such that the fourth defendant took over 14 of the 16 car parks originally managed by API prior to liquidation. Further it is contended that the third defendant acting in concert with the first and second defendants engineered the fifth and sixth defendants to take over the remaining two car parks, namely the Selangor Turf Club car park and the Dataran Merdeka car park respectively.

**[8]** In short, the plaintiff maintains that these defendants unlawfully ' took over' the business and operations of API (in liquidation) or positioned themselves such that they could transfer or siphon off the still lucrative car park businesses of the failing and insolvent API, thus continuing to run and operate these businesses through other entities, notwithstanding API's insolvency. To put it another way, the plaintiff's grievance is that notwithstanding API's insolvency, the exact same businesses of API have been neatly transferred to other corporate entities comprising a part of the stable of companies controlled by the first, second and third defendants. By so doing, these defendants who controlled API through Stess Sdn Bhd, continue to enjoy the assets and

businesses that were API's, simply by transferring those assets to businesses that are not insolvent. This, it is contended, comprises the unlawful act/s. This series of unlawful acts, it is contended, was planned, premeditated and put into effect by the first, second and third defendants, using the corporate entities of the fourth, fifth and sixth defendants where they are variously directors and/or shareholders, to commit these illegal acts with the purpose of causing damage and injury to the plaintiff.

**[9]** In this context the plaintiff maintains that the first and second defendants worked closely with and enjoyed a close relationship with the said Edison de' Cruz. They were both directors and shareholders of API, now in liquidation. D1 is a director and shareholder of the fourth and fifth defendants. Previously she was a director of the sixth defendant as well. D2 is also a director and shareholder of the fourth, fifth and sixth defendants.

**[10]** The third defendant is a daughter of Edison de' Cruz and is a shareholder and director of the fifth and sixth defendants.

**[11]** In summary the plaintiff contends that the first, second and third defendants, using the fourth, fifth and sixth defendants as corporate vehicles, conspired to strip or siphon off or remove the assets, business and operations of API prior to or close to its liquidation, so as to carry on with its operations through the fourth, fifth and sixth defendants. The intention of the defendants as a whole, it is contended, was to cause injury to the plaintiff by depriving it of its right or entitlement to a repurchase of the plaintiff's investment as well as its account of profits due from 2005. With foresight that API was going into liquidation, the first, second and third defendants manipulated or participated in the manipulation of the affairs of the company so as to safeguard their own interests by disposing of assets beyond the reach of creditors and to their own advantage. In the course of doing so, the plaintiff is thereby necessarily adversely affected.

**[12]** The defendants, by way of defence, deny the existence of any such conspiracy between the defendants or any one of them and Edison de' Cruz. They maintain that all the corporate exercises carried out were legitimate. Further, they contend that the liquidation of API resulted from its failure to meet its financial obligations to its banker, AmBank. The operations now carried on by the fourth, fifth and sixth defendants, they maintain, are legitimate businesses which were independently procured by these entities when it became clear that API could no longer function as a corporate entity as it was insolvent. With respect to two of the major and lucrative car park contracts, namely the Selangor Turf Club contract and the CSM contract, they point to the fact that API's contract for the operation of these car parks ceased when API was wound up. The fourth, fifth and sixth defendants, they

maintain, independently procured these car park contracts when API was wound up. The defendants deny all illegality and maintain that the businesses now conducted by the fourth, fifth and sixth defendants were undertaken purely to safeguard the employees and business of API and in no manner were calculated to, nor did deprive the plaintiffs of their claims. They point to the fact that there is no evidence to signify a conspiracy on their part, far less a conspiracy with the predominant intention of injuring the plaintiff.

**[13]** Additionally the defendants point to the fact that the filing and prosecution of this suit in addition to the earlier suit against Edison de Cruz and API amounts to a multiplicity of proceedings and is thus an abuse of process. They also contend that the shareholders' agreement dated 18 April 2004 is void for contravention of s 67 of the Companies Act 1965.

**[14]** Finally they contend that the plaintiff has no locus or standing to bring the current suit, maintaining that even if all the allegations of an alleged transfer or siphoning of assets is true, then this amounts to a contravention of the provisions of the Companies Act 1965. It is only the official receiver or the Director of Insolvency who can prosecute the relevant parties for such alleged contraventions.

## THE TRIAL

**[15]** The trial of this matter was somewhat protracted and took up a total of five days, which unfortunately was spread over a time period of more than a year, due primarily to the paucity of available dates on the part of counsel. Carlo Allaria alone testified on behalf of the plaintiff, while the first and third defendants gave evidence on behalf of the six defendants as a whole. They also called one other independent witness.

**[16]** In order to comprehend the true nature of the case, it is necessary to consider in greater detail the chronology of events and salient facts giving rise to this dispute.

## SALIENT FACTS

### *The evidence of Carlo Allaria on behalf of the plaintiff*

**[17]** As stated at the outset, the plaintiff company was incorporated by two Italian nationals, namely Carlo Allaria and his partner, Penna Luciana on 2 December 1994. The entire shareholding of the plaintiff is held by these two individuals. The business of the plaintiff is primarily the provision of architectural services to the construction industry. In addition to this, and material to this case, is the fact that the plaintiff also represented an Italian

company dealing in a fully automated car parking system. It acted as a consultant to this Italian company to promote and sell its automated car parking system to clients in Malaysia. In return, the plaintiff earned commissions.

**[18]** In the course of running the plaintiff's business, Carlo Allaria, who represents the plaintiff and gave evidence on its behalf at trial, PW1 ('Carlo') was introduced to one Edison D'Cruz who was at the time, the chairman of a group of companies. Carlo approached Edison D' Cruz with a view to selling the Italian automated car parking system to him. Having expressed interest, and after a trip to Italy to meet the owner of the system, API was appointed the sole distributor of this automated car parking system in Malaysia and Singapore. A distributorship agreement was signed between the Italian company known as *sistemi automatici parcamento* ('SAP') and API.

**[19]** Carlo assisted gratuitously in this enterprise as his objective was for the plaintiff to be appointed a consultant. In August 2003, Edison D' Cruz asked Carlo whether he was interested in investing in API. Funding was required for the establishment of this automated car parking system. After some negotiations, the plaintiff invested a sum of RM210,000 in API.

**[20]** The plaintiff entered into three agreements with API through the auspices of Edison de' Cruz who represented API. Vide what is termed a 'shareholders' agreement' dated 25 August 2003 between API and the plaintiff, the plaintiff subscribed to a 25% equity in API by payment of the sum of RM210,000. At that stage, API had procured a letter of award from the Selangor Turf Club to operate its car park. Under the terms of this agreement, the profit sharing ratio was 25% to the plaintiff, and 75% to API. This agreement also provided for the entire working capital of RM210,000 to be repaid to the plaintiff in the event of the termination of the shareholders' agreement, or if API ceased to carry on business and a series of other events. Such sum was to be repayable on demand.

**[21]** Thereafter API acquired the business of operating several other car parks. On 29 September 2003, Edison sent the plaintiff a proposal whereby he proposed that the plaintiff would procure 50% of the net profit arising out of a car park tenancy arrangement with one Menara CSM ('the CSM car park') in return for a payment of RM174,000. In early January 2004, API acquired the business of managing the car park for the said CSM car park and on 5 January 2004 API entered into a second agreement with the plaintiff in respect of the management of the CSM car park. Under this agreement the plaintiff paid out a sum of RM174,000 to API and the profit ratio between API and the plaintiff was to be 50% each. Here too the plaintiff received the 50% share of profits from API.

**[22]** In the course of further discussions, the plaintiff learnt from Edison that API had managed to procure the management and operation of no less than thirty car parks. A list of these car parks was made available to Carlo. Edison was seeking to persuade Carlo and Penna Luciana through the plaintiff to purchase 40% of API for a sum of RM6m. This did not materialise as the plaintiff had insufficient revenue to finance such a venture.

**[23]** On 28 January 2004, the plaintiff raised several queries it had about data it had received from API in relation to the car park business. The plaintiff was concerned about the integrity of the data received in relation to API's business. In an immediate response, API through Edison de' Cruz suggested that the plaintiff either continue with the joint venture profit sharing agreements it had previously contracted with the plaintiff, or that the plaintiff's payments be converted to the equivalent of a 10% share in API.

**[24]** The plaintiff made several queries of Edison de' Cruz and was advised, inter alia, that the shares of API were owned 100% by one Stess Sdn Bhd which was Edison de' Cruz's family company. Various other representations were made in respect of the prospective investment in API by the plaintiff. Carlo testified that he and Penna relied on the representations made by Edison De' Cruz to the effect that API's prospect of success, and the opportunity for the plaintiff to make a substantial profit, was clear. Projections were given to Carlo, premised on the thirty car parks comprising the profit making assets of API. Carlo further testified that Edison worked closely with the first defendant, Sarina bt Kamaludin in arriving at these projections. The extent of the profits projected was a target of RM35m by the year 2006. Based on these oral representations, coupled with the car park lists made available, the net profit was assessed at RM22m odd. On the basis of these projections, the value of a single share of API was expressed to be RM7. However Edison advised Carlo that he was prepared to sell shares to the plaintiff at RM4.80 per share. The plaintiff sought confirmation on the accuracy of the projected profits, and in response, an email dated 11 June 2004 was issued confirming the profit projections. In any event there was a promise to repurchase the subject shares at RM7 per share. Accordingly, in May 2004, the plaintiff paid a total sum of RM1.2m towards a 10% investment in API. Thereafter the plaintiff became a shareholder and investor in API.

**[25]** It is pursuant to the foregoing that the plaintiff entered into a shareholder agreement stated to be with API and dated retrospectively back to 18 March 2004. The shares were duly transferred to the plaintiff. The payment of RM1.2m by the plaintiff was made in two tranches and payment was made to, and received by, Stess Sdn Bhd. Under the terms of the agreement, the plaintiff was to receive 10% of API's net profit, such payment to be made annually before the month of May each year. The profits were to be based on

the audited balance sheet of API. Pursuant to this arrangement, the plaintiff initially received a share of profits from the car park management tenancy agreements that API entered into with various entities. The plaintiff took no part in the management or operations of API thereafter. The plaintiff initially continued to receive its share of profits from the Selangor Turf Club and CSM car parks. However it received no payments in respect of its investment in API. Neither was the plaintiff given sight of the audited balance sheet.

**[26]** Carlo, on behalf of the plaintiff, made repeated requests of Edison for the audited accounts to be provided and for the remittance of the 10% share of profits. After considerable effort, a first payment of RM296,000,000 was made for the year 2004. These payments were made in two tranches on 15 June 2005 and 30 June 2005 respectively. This turned out to be the only returns the plaintiff received for its investment. No further audited accounts were made available to the plaintiff notwithstanding repeated reminders and promises from Edison de' Cruz. Eventually Carlo called the auditors directly and was advised that the accounts had not been prepared because the requisite documentation had not been received from API. Carlo confronted Edison who nonetheless maintained that they would receive their profits and that the buy-back option remained whereby the plaintiff's shares would be repurchased at RM7.

**[27]** As nothing transpired however, Carlo testified that he realised then that the plaintiff had been cheated. He lodged complaints with the Ministry of Trade and the police. In the interim however, API continued to manage and operate numerous car parks. Remuneration was collected on a daily basis from these car parks which were all over Kuala Lumpur, Petaling Jaya and Johore Bahru.

**[28]** The civil suit against Edison and API was also commenced in D3–22–1492 of 2006 on 12 October 2006. On 10 July 2009, the plaintiff obtained a mareva injunction which was maintained on an inter partes basis on 3 November 2009 whereby Edison de' Cruz and API were restrained from removing or dissipating any assets up to the value of RM3m. In the course of these proceedings API confirmed that it possessed assets including 16 car parks managed and operated by it.

**[29]** A winding up petition was presented by AmBank against API sometime in June 2009 and API was wound up on 18 November 2009.

**[30]** Carlo testified that the first, second and third defendants who are all employees and the child of Edison de' Cruz, worked closely and together, to remove or strip API of its assets and transfer these assets to other companies, so that revenue could continue to be collected notwithstanding that API was

wound up. As has been set out earlier, D1 is a director and shareholder of API in liquidation. She is also a director and shareholder of the fourth defendant and sixth defendant. Similarly the second defendant is also a director and shareholder of API in liquidation. He is also a director of the fourth, fifth and sixth defendants. The third defendant who is one of Edison de Cruz's daughters is a shareholder and director of D5 and D6. The corporate entities utilised to receive the transferred assets of API were the fourth defendant, Auto Parking (M) Sdn Bhd whose name is almost identical with that of API. It was incorporated on 18 April 2008. The 5th Defendant was incorporated on 6 September 2006 and D3 is a director and shareholder of the same. The sixth defendant was incorporated on 9 June 2005 and the first directors and shareholders were the first and third defendants. The latter three defendants are all stated, as corporate entities, to be engaged in the business of car park operators.

**[31]** The crux of Carlo's grievance on behalf of the plaintiff against these six defendants is that they conspired and acted in concert to strip away the car park management contracts and businesses of API and transfer them to D4, D5 and D6 in view of the impending insolvency of API, so as to ensure the continued collection of revenue from these businesses by the same group of persons who are directors or persons closely associated with the insolvent entity, API. The affairs of API were manipulated so as to remove its assets which should have remained available in the course of liquidation for the benefit of the body of creditors as a whole.

**[32]** It is not in dispute that API ran no less than 16 car parks as late as 23 July 2009, as evidenced by disclosure provided in the other civil suit. The first defendant has stated under oath that this was the case.

**[33]** However Carlo testified that when he visited all these 16 car parks personally in February 2010, after API had been wound up, he found that all the car parks still bore the name of Auto Parking Inc and were in full operation. Carlo took photographs of his visits and retained copies of the receipts procured for parking fees. He found that these receipts were still being issued in the name of API. Again this is not in dispute. Although Carlo wrote to all the owners of the car parks to ascertain the status of the contract between the car park operator and the owner, he received no reply.

**[34]** He carried out the same exercise between 26 April 2010 and 28 April 2010 and found that most of the car parks now operated under the name of the fourth defendant. Again receipts and photographs were produced at trial to substantiate his evidence, which indeed this documentary evidence did. Two of the car parks were taken over by the fifth and sixth defendants. The fifth defendant had taken over the Selangor Turf Club car park while the sixth

defendant took over the car park operated at Dataran Merdeka. The sixth defendant is named as the manager of the car park while within the car park the name of API was retained, and the ticket issued at the time for a car park ticket still bore the name API.

**[35]** From the foregoing series of events, Carlo testified that he inferred that the business and assets of API were appropriated and transferred to the fourth, fifth and sixth defendants at the behest of the first, second and third defendants who had worked together in concert, to ensure that the car park businesses managed and operated by API, continued to give them the revenue that they could no longer procure through API, which was in liquidation. This had been done prior to API being wound up. Carlo testified that such a transition of the businesses could not have been possible unless these defendants had acted in concert with each other and conspired to ensure the same. The predominant purpose, he said, was to ensure that the plaintiff was deprived of its profits and/or the repurchase of its investment.

**[36]** Carlo's testimony, in so far as it related to the factual matrix of this case, remained unshaken during the course of his cross-examination. However he conceded that his comprehension of the positions held by the first, second and third defendants as directors and/or shareholders of the fourth, fifth and sixth defendants was not entirely accurate. In like manner he conceded that the winding up of API occurred as a consequence of API failing to meet its debts due and owing to AmBank as a consequence of which a winding up petition was filed. Carlo also conceded that the winding up was not a 'sham' in view of the documentation which disclosed that API had attempted to appeal and procure a stay prior to the winding up order being made against it. These facts disclose that the winding up petition was not in itself presented purely as a facade, but was a genuine attempt by a creditor to recover monies due to it. It also shows that API was insolvent, resulting in its liquidation. The issue that arises here is whether the stripping of the assets upon insolvency was carried out pursuant to a conspiracy on the part of the defendants to injure the plaintiff, so as to preclude it from getting its profits and dues. In so far as Carlo was concerned, I found him to be a credible witness in relation to all factual matters that he testified on. However he candidly admitted that he could not say with any degree of certainty when the 'conspiracy' to injure the plaintiff had commenced. He could merely look at the end result of how the assets of API had been stripped or siphoned off, and from that factual matrix, infer that there must have been a conspiracy in place for the assets of API to be so neatly transferred to the fourth, fifth and sixth defendants. This of course is a matter of fact and law for this court to ultimately determine.

THE DEFENCE CASE

**[37]** The defendants called three witnesses, namely Sarina bt Kamaluddin,

DW1 ('Sarina'), Sharmilee de' Cruz, DW2 ('Sharmilee') and one Venketiswaran Sankar, DW3 ('Sankar') on behalf of all the defendants.

THE EVIDENCE OF SARINA KAMALUDIN, THE FIRST DEFENDANT

**[38]** Sarina Kamaludin, the first defendant, is also a director of the fourth defendant, Auto Parking (M) Sdn Bhd. She was one of the first directors of the sixth defendant. Additionally she was at all material times both a shareholder and Director of API.

**[39]** In the course of her examination in chief, she dealt firstly with the agreement between the Selangor Turf Club and API ('the STC contract') where the plaintiff sought an account of 25% of the profits from 2004 onwards; secondly with the agreement between API and CSM ('the CSM contract') and finally with the shareholders' agreement entered into between API and the plaintiff dated 18 March 2004 ('the shareholders' agreement') relating to the 10% profits from the business activities of API which was wholly concerned with the management and operation of no less than 16 car parks.

**[40]** In so far as the Selangor Turf Club is concerned, API was granted the right to operate the car park from 28 July 2003. The STC agreement between the plaintiff and API was dated 28 August 2003. 25% of the profits were to be accorded to the plaintiff. The Selangor Turf Club contract with API was however terminated in 2009, when API was unable to make the requisite rental payments. Sarina explained that when API defaulted in the repayment of rentals to STC, the fifth defendant, Stess Services Sdn Bhd was given or took over the car park contract from API. The fifth defendant was incorporated in 2004 and its director and shareholders are the second and third defendants.

**[41]** The CSM agreement, Sarina explained, was terminated on 29 September 2006 as the car park had to be renovated. No mention was made of whether the requisite profits to the plaintiff were paid.

**[42]** With respect to the shareholders' agreement, Sarina confirmed Carlo's testimony relating to the same. She explained that they were unable to make the 10% profit payment because the audited accounts were delayed for a number of reasons which she elucidated in her testimony. It is not in dispute that the audited accounts for API were only made available upon the commencement of legal proceedings by the plaintiff and produced since. A perusal of the same does not provide a convincing or tenable excuse for the inordinate delay in the filing of the audited accounts.

**[43]** Sarina confirmed that only one payment was made pursuant to the shareholders' agreement as testified by Carlo, in the sum of RM296,000. She however maintained that this amounted to an overpayment in view of the audited accounts now available.

**[44]** Sarina went on to explain the sequence of events leading up to the winding up of API. She explained that API financed itself by procuring loans from banks and utilising its excess revenues earned. On 20 June 2005, API purchased the lease for Plaza Putra Dataran Merdeka for a purchase price of RM7.4m with a view to developing a basement car park and to also set up a trade centre. However these plans did not materialise for various reasons including flash floods in 2007. API ran into problems because it was unable to service various loans. As such API decided to source a purchaser for the lease from API. API, she claimed, had to do so discreetly so as not to affect adversely the prospective purchase price for the lease.

**[45]** She further testified that API also had to procure the consent of DBKL which insisted that the sale should be to a company with common directors or shareholders. Accordingly the lease was sold to the sixth defendant Stess Property Sdn Bhd as an interim vehicle as the directors were the same as API, namely Sarina and Kelvin Rajoo. After the sale, according to Sarina, the existing directors resigned and the shareholders transferred their shareholdings to the new party directors and shareholders. For this API was paid, she testified, RM12.5m. API was then able to settle most of its debts save for that due and owing to AmBank in the sum of RM4,775,669. As a consequence AmBank foreclosed and obtained judgment against API on 15 April 2009. Both a stay of execution and an appeal to the Court of Appeal failed. A winding up petition was presented sometime in June 2009 and API wound up on 18 November 2009. The relevant period for the purposes of assessing the date of commencement of winding up is therefore June 2009 (see s 219(2) of the Companies Act 1965). In summary, Sarina maintained that the winding up of API could not be prevented, and was certainly not designed, to deprive the plaintiff of its share of profits.

**[46]** In relation to the siphoning off of API's assets, Sarina denied Carlo's allegations and maintained that all actions taken by the defendants were done in good faith and were legitimate corporate actions.

**[47]** She explained that the fourth defendant, Auto Parking (M) Sdn Bhd came into being after the making of an agreement dated 17 March 2008 between API and one Loganathan in the name of his wife. In essence in March 2008, API required an urgent injection of funds and therefore in return for a sum of RM500,000 the said Loganathan was allowed to take over the administration of five car parks. This was done through the entity of the fourth

defendant which was incorporated around that time. However in November 2008, Loganathan was unable to carry on with the arrangement and returned the running of the car parks to API together with a refund of the RM500,000 that had been paid. API however, was unable to repay this debt. Instead therefore, Sarina testified that she and the second defendant, Kelvin Rajoo, decided to take over the fourth defendant which they duly did, and thereby the management of the five car parks. According to Sarina, she and the second defendant were still repaying Loganathan the sum of RM500,000.

**[48]** After API was wound up in November 2009, Sarina testified that she and the second defendant, Kelvin Rajoo needed to save the livelihood of all the employees of API involved in the various car park businesses and therefore they approached all the car park owners for the fourth defendant, Auto Parking (M) Sdn Bhd to take over these car park contracts. This was duly done. She conceded that the fourth defendant did utilise API's equipment but that they would account to the official receiver in this regard.

**[49]** With regard to Carlo's evidence that as of February 2010 many of the car parks still had API signboards and car parking receipts with API's name, she maintained that it took them some time to alter all the signboards and settings to reflect the new operators.

**[50]** In the course of cross-examination, Sarina was, at the outset, somewhat reluctant to respond to the legitimate questions put to her by learned counsel for the plaintiff. This necessitated this court requiring her to answer questions to the best of her knowledge.

**[51]** She testified that she became a director of API in May 2003. She had worked in the company since its incorporation in the accounts department. Kelvin Rajoo had also worked there and was appointed a director of API in March 2002. She could not recall whether they were the only two directors.

**[52]** The sixth defendant, Stess Property Sdn Bhd, she confirmed, was incorporated in 2005 by herself and Sandra Sharmilee de' Cruz. She confirmed that it shared the same registered address and business address as API. Although it was incorporated, according to her to undertake property investment businesses and to manage properties, it did not do so. It is entirely unclear from her evidence what precisely the business of the sixth defendant, Stess Property Sdn Bhd was.

**[53]** In any event, the sixth defendant shared a name with Stess Sdn Bhd, a majority shareholder of API. Stess Sdn Bhd is also the family company of Edison de' Cruz, whereby members of his family were directors and shareholders. Additionally, Sarina was also a director and shareholder of Stess

Sdn Bhd. When shown the list of shareholders of Stess Sdn Bhd who were all related to Edison de' Cruz, Sarina refused to confirm that they were the shareholders as of the date of incorporation. It appeared to this court that she was being deliberately evasive, given that she had been a director and shareholder of Stess Sdn Bhd for some considerable time.

**[54]** Sarina confirmed that she and Sharmilee were the first directors of Stess Services, the fifth defendant. Kelvin Rajoo was subsequently appointed a director. She explained that it had been incorporated to manage the collection of members' fees in the Selangor Turf Club. When it was put to her that on incorporation it was also envisaged that it would participate in the car park business, as borne out by the description of the nature of business undertaken by the company, Sarina maintained that this was incorrect. However at present, the fifth defendant, Stess Services Sdn Bhd has, in fact, taken over the operation of the car park contract for the Selangor Turf Club from API.

**[55]** From the foregoing it follows that in 2005, Sarina was running the car park business of API, a director managing the fifth defendant, Stess Services Sdn Bhd, a director of the sixth defendant, Stess Property Sdn Bhd with the third defendant and a shareholder and director of Stess Sdn Bhd the family company of Edison de' Cruz. She confirmed that she was fully involved in the businesses relating to the Stess and API group of companies.

**[56]** With regards to Edison de' Cruz, Sarina conceded that although he was not a director of API, he was represented to the world at large as the chief operating officer or chief executive officer or in a similar capacity. She described him as their advisor.

**[57]** With regards to the sale of the Plaza Putra lease originally belonging to API to Stess Property Sdn Bhd, Sarina testified that at the material time, the directors of API were herself, Sharmilee and Kelvin while the directors of Stess Property Sdn Bhd were Kelvin and Sharmilee as Sarina had by then resigned. Stess Property, she maintained was utilised as a vehicle for the sale of the lease. The new owners of Stess Property after the sale were Venkiteswaran Sankar and one Epeli. It was in essence suggested and put to Sarina that the sale was a sham, to which she disagreed.

**[58]** However no documents pertaining to the sale were before this court. Sarina maintained that after the sale of the Plaza Putra lease at Dataran Merdeka to the new owners, API had no business there save the rights to operate the car parks on a month to month basis. When she was asked to confirm that as at the time of the sale, API no longer owned the lease of the car park in Plaza Putra, her response was that while API had sold the lease, the new owners had to redeem the property from CIMB by reason of the legal charge on

the same. She maintained that the car park business was still with API notwithstanding the sale of the lease because they were given the rights to operate the car park.

**[59]** This point was made because in an affidavit dated 23 July 2009 deposed to by Sarina in respect of an injunctive relief application, she had continued to list the Plaza Putra car park as part of the list of assets and car parks of API. Sarina maintained that this was because API was still managing the car park. It appears to this court, particularly after assessing the evidence of Venkiteswaran Sankar, DW3, that it is difficult to assess whether the sale of the Plaza Putra Dataran Merdeka lease purportedly by API to the new shareholders and directors of Stess Property Sdn Bhd was in fact genuinely effected for the purchase price stated. No evidence was produced in court to that effect. I shall consider Sankar's evidence subsequently, but looking at Sarina's evidence alone, it is not clear whether it was a genuine sale that was validly and legitimately transacted, or whether it was simply a sham designed to strip away or siphon off a valuable asset to a related company. In any event, Sarina confirmed that API ran and managed the Plaza Putra Dataran Merdeka car park for Stess Property Sdn Bhd. She however refused to concede that Stess Property was running the car park business through API. She maintained that API was managing the property for Stess Property Sdn Bhd and that API received a management fee. However she was unable to explain why as late as February 2010 (when API was wound up in November 2009) the API signboard was still in place and tickets were issued in the name of API. This is a suitable juncture at which to consider the various companies and the relationship of the various defendants thereto. The first and third defendants, Sarina and Sharmilee are both directors and shareholders in Stess Sdn Bhd, the family owned company of Edison de' Cruz. Stess Sdn Bhd is a majority shareholder of API. The first and second defendants are both directors and shareholders of API. Similarly the first and second defendants are both directors and shareholders of APM, the fourth defendant. Sarina and Sharmilee and subsequently Kelvin became directors of Stess Services Sdn Bhd, the fifth defendant, while initially Sarina and Sharmilee and subsequently Kelvin and Sharmilee were Directors of Stess Property Sdn Bhd, the sixth defendant, until the purported sale of the Plaza Putra Dataran Merdeka lease to a third party.

**[60]** It is evident from the foregoing paragraph and the testimony of the witnesses taken as a whole that API, the fourth defendant and the entire Stess group of companies were completely inter-related and in fact, inter changeable. API and Stess Services and Property Sdn Bhd shared the same registered and business addresses, and the same officers were directors, shareholders, and managed the core business of this group which was the management of car

parks. There was no evidence produced of any other business that was conducted by these entities, save for the collection of membership fees of STC by the fifth defendant.

**[61]** With regards to the incorporation and use of the fourth defendant purportedly to procure an injection of RM500,000 from the said Loganathan, Sarina maintained that they had known Loganathan through business dealings. He had no experience in managing car parks. The contract, she maintained, was entered into after negotiations with Kelvin and Sharmilee. She accepted that Loganathan's wife was a 'front' for the agreement. She also conceded that notwithstanding the agreement, API had continued to manage the operations of the five car parks which had been handed over to Loganathan. Within six months she confirmed that the situation was reversed as explained earlier, with herself and Kelvin stepping into the shoes of the fourth defendant and taking over from Loganathan.

**[62]** A consideration of the chronology of events, the lack of documentation, and the constant thread of API managing the car park throughout these various transactions, leads this court to the conclusion that the entire purported 'contract' with Loganathan was nothing more than a sham. Neither Loganathan nor his wife nor mother in law, the main actors, testified at trial. Although Loganathan, it is said, is ill with lung cancer, there was no reason why his wife could not have testified as to the authenticity of this entire episode purportedly trying to inject a sum of RM500,000 into API. No evidence was produced to show that such monies were actually received by API or how these monies were utilised. In the absence of any such evidence, and given the ease with which the contracts were entered into and then revoked, coupled with API continuing to manage all car parks throughout this time, it is more than likely that this transaction was a sham and that at no time were these five car parks really divested for good consideration to other parties. The entire chronology of events appears to this court more to be a channel or means of siphoning off or transferring the assets of API to another entity in view of its impending of foreseen insolvency.

**[63]** Having dealt with the Plaza Putra Dataran Merdeka car park purportedly sold to the sixth defendant, and the five car parks transferred to the fourth defendant, it remains to be considered how the balance of the car parks in API's stable were dealt with. It is clear from Sarina's evidence herself that when API was wound up, they simply approached the car park owners and procured a transfer of the car park operations to the fourth defendant, Auto Parking (M) Sdn Bhd. When it was put to Sarina that the fourth defendant was not in reality a separate entity from API, she disagreed.

**[64]** Sarina explained that they took the step of removing or transferring all

the 'assets' of API, namely the car park operating contracts for 11 car parks and transferring them to the fourth defendant to 'save' the livelihood of the numerous employees. This however does not excuse or alleviate the fact that the removal or disposal of what amounts to assets of API constitutes a disposal of a company's assets in liquidation in contravention of s 223 of the Companies Act 1965. This is patently clear from the defendants' own evidence. It in effect amounts to an appropriation of the car park business of API which amounts to an appropriation of money making assets of the insolvent company.

**[65]** Finally the other lucrative car park contract that API enjoyed was with the Selangor Turf Club. That contract did not devolve to the fourth defendant, but to the fifth defendant. While the defendants maintains that the procurement of this contract by the fifth defendant is bona fide, in that the contract with API was terminated for default, the reality, as is evident from a consideration of the workings of this entire group of companies, is that the fifth defendant and API were not really separate entities. They functioned interchangeably in terms of the business of managing the car parks.

**[66]** The evidence of Sarina and Sharmilee who testified for the defence at trial warrants the inference that the stess group of companies and the automated parking companies were part of a group controlled by the first three directors and possibly the de' Cruz family. As pointed out earlier, these companies all functioned effectively as one entity seamlessly. The common factor throughout was Edison de' Cruz and the first three defendants named in this suit. Even if Edison de' Cruz is discounted as he was not present in this suit, the role of the first three defendants here alone is sufficient to justify a finding by this court that the three entities functioned as one.

**[67]** This is evident, inter alia, from:

(a) the common directors and shareholders of API and the third, fourth and fifth defendants as well as Stess Sdn Bhd — they comprise the first, second and third defendants repeatedly;

(b) these entities all operated from essentially the same premises, the same registered address and business address;

(c) the first three directors and shareholders worked together in running these companies;

(d) these companies were all involved in the running and management of car parks only. They were not involved in other businesses save for Stess Services which dealt with the collection of members' subscriptions in the Selangor Turf Club;

(e) Edison de' Cruz was a common advisor to all these companies. The third defendant is his daughter while the first and second defendants were his

initially his employees with his first company, SBL (which was earlier wound up) and subsequently became directors and shareholders in this stable of companies;

(f) the alleged incorporation of the fourth defendant initially to effect a sale of some of API's business to Loganathan appears to this court to be a sham for the reasons set out in relation to that issue which I have discussed above;

(g) it is not possible to ascertain with any degree of certainty that the purported 'sale' of the Plaza Putra Dataran Merdeka lease to Stess Services Sdn Bhd now with new shareholders and directors in place, is in fact a genuine disposition for valuable consideration. There is insufficient evidence before this court for it to ascertain that this is a genuine transaction;

(h) the evidence and investigation of Carlo above bears out the position that the same people through the fourth defendant and the Stess Group carried on with API's business as borne out, inter alia, by the use of the same signboards and ticketing machines etc; and

(i) the net effect of the efforts to transmit or transfer or siphon off the assets of API having foreseen API's impending liquidation, and again on liquidation to other entities, has in effect been an attempt to keep these assets within the control of the Stess and Auto Parking group of companies. In other words, the transfer of the car park contracts of API to APM do not give rise to a change in the ownership of the management of these car park operations. In effect API's assets have been transferred out of the entire scheme of liquidation to avoid such assets being distributed amongst creditors. Instead these lucrative businesses have been transferred to the fourth defendant. Similarly the STC car park contract is with Stess Property Sdn Bhd, the sixth defendant. As such, the same group of persons who controlled API continue to receive the benefits of those same assets, but through the guise of different but related entities, namely the fourth defendant and the fifth and sixth defendants. The group of companies is therefore controlled by D1, D2 and D3 who have ensured that these assets remain within their control. In other words the corporate entities of APM and the Stess group of companies have been utilised by the first to third defendants interchangeably, to retain the benefit of the assets that originally belonged to API. The assets of API have systematically been transferred to other corporate entities within the group controlled by the same group of directors, so as to put API's assets out of the reach of its creditors, including the plaintiff.

**[68]** In summary, Sarina's evidence (as stated before) was initially less than forthcoming. She struck me as a reluctant and suspicious witness who was not willing to volunteer information pertaining to the corporate structure and

background of the API and Stess group of companies where she played an active and dominant role for many years. As her testimony progressed, she improved and answered the questions put to her sufficiently. However her explanation as to the allegedly independent functioning of the various corporate entities in the Stess and AP group of companies was not credible. Neither was her version of events leading up to the divesting of five car parks to Loganathan via the fourth defendant, and the subsequent retaking of those car parks by assuming ownership of the fourth defendant, a credible version of events. Having considered the evidence as a whole throughout the trial, it appears to be far more tenable to infer from the circumstances that the entire Loganathan transaction was merely a facade to provide a basis for the divesting of some of API's assets to another corporate entity. That she and Kelvin Rajoo subsequently took control of the fourth defendant and thereby procured control once again of these car parks, and eventually most of the car parks operated by API, bears out this inference or conclusion.

A B C D

THE EVIDENCE OF SANDRA SHARMILEE DE' CRUZ, THE THIRD DEFENDANT

**[69]** The evidence of DW2, Sharmilee corroborated the evidence of Sarina and confirmed my findings above. She testified that she was a shareholder and director of Stess Services, the fifth defendant upon its incorporation, together with Sarina, and that Kelvin was appointed subsequently. She also confirmed that Stess Sdn Bhd is a family owned company where she is a director, and that it is a majority shareholder of API. She also confirmed that she was involved in the operation and management of the businesses of API, Stess Services Sdn Bhd and Stess Property Sdn Bhd. In all these businesses she worked actively with Sarina and Kelvin. She also testified that Edison de' Cruz was key in advising the three of them on business development aspects and contract negotiation and how to proceed financially. This therefore corroborates Carlo's evidence that Edison de' Cruz played a major role in these various entities.

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**[70]** Sharmilee also confirmed that apart from running the business of the fifth defendant, Stess Services Sdn Bhd in relation to the collection of membership dues for the Selangor Turf Club, she also ran the car park operation business with Sarina. When it was put to her that Stess Services taking over the car park operation contract of API in relation to STC did not involve any real change in management she disagreed, maintaining that there was a termination and that Stess Services had to compete for the contract. However having considered the evidence as a whole I am unable to accept that this answer is entirely credible. It is entirely too convenient for Stess Services Sdn Bhd, the fifth defendant, which is managed by the same people as API, with the same office, should continue to run the STC car park service when API was wound up. It is simply a transfer of an asset of an insolvent company.

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**[71]** On the issue of the failure to alter the signboards showing that API continued to run the various car parks notwithstanding liquidation and apparent 'taking over' by the Stess Group and APM, the fourth defendant, Sharmilee had no tenable explanation, save to maintain that changes to reflect the change in ownership had not been undertaken expeditiously. However it appears to this court that the more tenable explanation is that no attempt made to effect any changes, as in essence, the operation and maintenance of those car parks continued as they had always done, through the auspices of the same persons who operated variously as API, Stess Services Sdn Bhd the fifth defendant, Automated Parking (M) Sdn Bhd the fourth defendant and even Stess Property Sdn Bhd the sixth defendant or through nominees. Hence the same equipment which belonged to the group as a whole and the use of the same ticketing machines continued notwithstanding the liquidation of API. The liquidation of API failed to affect the affairs and assets of the Stess and Auto Parking group of companies controlled, inter alia, by the first, second and third defendants because all the assets of API worth saving had been 'siphoned' or transferred out.

**[72]** Neither was Sharmilee able to explain why, if entities other than API received monies for the parking of cars, receipts were issued in API's name. This is another indication that API continued with the car park operation business seemingly through its other related entities.

**[73]** All in all Sharmilee was a more direct witness than Sarina. While she answered the questions put to her, her denial of the fact that the fourth, fifth and sixth defendants together with API functioned effectively as one entity interchangeably, with herself and the first and second defendants in control of the same, appeared untenable in view of the weight of evidence supporting such an inference. Accordingly her contention that there was no 'transfer' or siphoning off of the assets of API to the fourth, fifth and sixth defendants was equally not credible.

**[74]** However her contention that these matters were undertaken not with a view solely to deprive the plaintiff of his share of profits in API appeared more plausible. It would appear that the assets of API were stripped from the time when it was foreseen that API was becoming increasingly more insolvent, from 2008 onwards, until winding up in November 2009. The net effect was to deprive all creditors, including the plaintiff of the assets of API.

## THE EVIDENCE OF THE THIRD WITNESS FOR THE DEFENCE, VENKITESWARAN SANKAR

**[75]** Venkiteswaran Sankar, DW3 ('Sankar') testified on behalf of the sixth defendant, Stess Property Sdn Bhd. In his witness statement he explained that

Kelvin Rajoo and Sandra Sharmilee resigned and that he and one Epeli Kanai Mawi were appointed directors in their place on 12 May 2008 and 18 March 2009 when they bought over the shares of Stess Property Sdn Bhd, the sixth defendant. He further testified that towards the end of 2007 he was approached by the directors of API through one Tony Anastasi to purchase the lease of Dataran Merdeka. Sankar and Epeli decided to invest in the project on condition that DBKL consent to the lease being transferred to them. He corroborated Sarina's evidence that DBKL required that common directors be retained for purposes of the lease. As such he confirmed that they agreed with API to the use of the sixth defendant as an intermediate conduit as its directors were the same as API. A sale was then effected, according to him, on 11 January 2008. Subsequently the sixth defendant, Stess Property Sdn Bhd purchased the lease for Dataran Merdeka on 25 April 2008, after which, Kelvin Rajoo and Sharmilee resigned as directors and transferred their shareholdings to Sankar and Epeli who became the new directors and shareholders.

**[76]** Sankar also testified that he played no part in any conspiracy against the interests of the plaintiff or Carlo Allaria, insisting that the purchase of the lease from API was purely a business transaction.

**[77]** He also explained the continued listing of Dataran Merdeka as being a part of API's assets by Sarina in an affidavit as arising, because at that time, the car park there was still being managed by API for and on behalf of the sixth defendant, on a month to month basis. This arrangement came to an end when API was wound up when the sixth defendant terminated the arrangement. He did not produce any evidence of the existence of such an agreement for the management of the car park nor the payment of any fees to API.

**[78]** He maintained that the purchase of the Dataran Merdeka car park by the sixth defendant was an arms' length transaction, and that the question of 'appropriation' was 'wild'.

**[79]** In the course of cross-examination Sankar confirmed that he had no experience in the car park business when he and his partner, one Epeli, purchased the lease of Dataran Merdeka from API for the purchase consideration of RM7.4m. However this sum appears to be somewhat anomalous with the evidence of Sarina who referred to a figure of RM12.5m. DW3 explained that the purchase of the lease was not only by reason of the car park business. The car park businesss comprised, as he put it, 'an incidental part of the business'. Sankar also testified that this was the first commercial property business he had ventured into. He testified that he did not have any direct discussion with the directors of API in respect of this transaction. Instead, he communicated with Tony who supplied all the requisite information. This, he maintained, was sufficient to enable him to make a decision to purchase the

Dataran lease for a sum of RM7.4m in conjunction with his partner, Epeli. Epeli is a retired businessman from Fiji. He did not testify.

**[80]** In the further course of cross-examination it transpired that Tony Anastasa had brought together Sankar and Epeli for this project pertaining to the purchase of the lease of Dataran Merdeka.

**[81]** When asked how a professional accountant and a retired diplomat could come up with RM7.4m, his reply was that the initial investment was only RM1m while the rest was 'obtained later and injected'. Apart from this general statement, no attempt was made to particularise or produce evidence of how this not inconsiderable sum of money was procured for purposes of this investment.

**[82]** Sankar was unable to fully explain how he and Epeli had raised the sum of RM7.4m. He appeared outraged when asked whether he had in fact, purchased the lease for RM7.4m:

Q: Did you buy the lease for 7.4 million?

A: It's a private deal between me and the people who sold it … I refuse to answer that question.

**[83]** Given that the central issue in relation to his testimony relates to whether the sale of the Dataran Merdeka lease to him and Epeli was a real commercial transaction, or whether it was simply a facade to enable API to siphon off its assets to a related entity held through nominees, the issue of whether the lease was really purchased at a price of RM7.4m by these parties is significant. DW3's refusal to respond to this question and his anger, exhibited clearly that he was not prepared to testify on this issue. He was hostile on this central issue.

**[84]** It was then put to him that he and Epeli were used by API and the sixth defendant, Stess Property Sdn Bhd to run the Dataran Merdeka car park business for them, and in the event they went down, to use the sixth defendant to take over the business of API. Sankar disagreed maintaining that he had no interest in the car park or API or any other car parks.

**[85]** Sankar was unable to recollect the details of when the agreement between API and Stess Property Sdn Bhd was executed. He confirmed after checking with his witness statement that as at 25 April 2008, Stess Property was the owner of the Dataran lease including the car park. While he maintained that he was unaware why Sarina had included the lease as one of the assets of API, he suggested that perhaps it was meant that the Dataran Merdeka car park

was one of the sources of revenue for API. He then went on to confirm that the sixth defendant paid API fees to run the car park business. However he produced no evidence of the same. He further explained that a bank had taken over the management of the car park and monies went into a designated bank account.

**[86]** Prior to API being wound up, he explained that he and Epeli had left the entire car park operation and maintenance to API. He could not explain why API's name remained notwithstanding the change in ownership from API to the sixth defendant. He stated that this was not a major priority, as they were primarily concerned with converting the area into a trade centre.

**[87]** Sankar also explained that he came to know Tony Anastasi, who introduced him to Epeli and who approached him to purchase the lease, because they were both freemasons. Edison de' Cruz was also a freemason and he confirmed that he has known Edison de' Cruz even before he knew Tony Anastasi. He said that he only knew Edison's connection with API after the completion of the transaction for the purchase of the lease. When pressed further on this issue he said that he and Epeli did not go into the transaction on the basis that Edison was behind it.

**[88]** It was then put to him again that he and Epeli were used as a front as directors of the sixth defendant to obtain investment or monies for the purposes of Dataran, to which he disagreed. It was also suggested that Sankar and Epeli were not investors in their own right but were working together with Edison de' Cruz and the directors of API. Again Sankar disagreed. In so far as the purchase of the lease for its development, Sankar stated that it was not a viable project as funding had not come through.

**[89]** Sankar came across as a less than credible witness. From the foregoing summarisation of his evidence I was unable to accept that Sankar was a witness of truth by reason of the following factors:

(a) it is not credible that a professional accountant such as Sankar would venture for the first time into a commercial venture of a relatively large magnitude with a partner introduced to him by a third party, and together, again allegedly through a third party, acquire the lease of Dataran Merdeka with its car park business without having any experience whatsoever in such business;

(b) when considered together with the fact that there was no evidence before this court of how this commercial venture for allegedly RM7.4m was effected, save for a vague statement to the effect that funding was procured, and the hostility exhibited by the witness when he was

questioned on this more closely, there is sufficient basis to question whether such a purchase of the lease for a real consideration of RM7.4m was in fact effected;

(c) it is unusual that the entire transaction was effected through the said Tony Anastasi without any direct communication between the primary parties, namely API and Sankar and Epeli. To this end, Sankar testified that there was not a single meeting had been held with the directors of API before he invested in the purchase of the lease;

(d) both Sarina and Sankar testified that the reason the transaction was effected by way of a sale of the sixth defendant as an intermediary was because DBKL had insisted that the sale of the lease be effected to an entity with the same directors and/or shareholders as API. However the net effect of the transaction, while temporarily holding out Kelvin Rajoo and Sharmilee as directors of the sixth defendant, culminated in Sankar and Epeli becoming new directors of the sixth defendant in April 2008. This would still amount to a contravention of the grant of the lease with regards to the condition imposed by DBKL. This is because there would appear to be no common directors as of that date. So the reason given by both these witnesses to justify the sale of the Dataran Merdeka lease in this form is not credible, as it does not achieve what was stated to be the desired result;

(e) it transpires from Sankar's evidence that he knew Edison de'Cruz as they were both fellow freemasons, that too before he met the third party who allegedly put together this deal, Tony Anastasia, who was also a freemason. In these circumstances it is again less than credible that Sankar embarked on a large scale commercial venture for the first time without knowing of Edison de' Cruz's involvement in API. This again points to the fact that the entire transaction could be linked to Edison de' Cruz;

(f) the fact that Sarina included the Dataran car park as a part of the assets of API suggests that the alleged 'sale' to the sixth defendant was a facade to facilitate the removal of a valuable asset before API was wound up;

(g) although Sankar maintained that the sixth defendant had paid a monthly fee to API for the operation of the car park and that monies from collection were paid into a designated account, he produced no evidence to substantiate these oral statements. Such evidence could easily have been made available in documentary form to corroborate his statements;

(h) Sankar was unable to explain the continued use of API's name in the car park and his dismissal of this issue, particularly the printing of receipts in API's name is again less than credible, particularly given that he had allegedly expended RM7.4m for the purchase of this lease; and

(i) there was no evidence before this court of the existence or development of any other viable project as suggested by Sankar, such as the development of a trade centre. The fact that three years on, in 2011 there is still no evidence of such a project, coupled with his concession that the alleged 'project' is now no longer viable, it brings to the fore the question of whether or not there ever was such a 'project'.

**[90]** Given the foregoing facts and the rest of the evidence put forward in respect of the defence case, particularly Sarina's evidence, it appears to this court that Sankar and Epeli were utilised as 'fronts' or nominee directors by the API and Stess group of companies controlled by the defendants to take over a valuable asset of API, namely the Dataran Merdeka lease in view of API's insolvency. In this context therefore it would appear on a balance of probabilities that Sankar and Epeli were probably not real investors in their own right but were working together with the first, second and third defendants as well as Edison de' Cruz. This is particularly so given their complete lack of experience in relation to car parks, the lack of evidence to substantiate their claim of purchasing the lease for RM7.4m and the absence of any project whatsoever from the date of alleged purchase of this lease. Finally the fact that API still appeared prominently in relation to the car park business here fortifies the findings of this court.

**[91]** The evidence as a whole, particularly the evidence of Sarina and Sankar, when considered together with the evidence of Carlo Allaria for the plaintiff, bears out the fact that there was a concerted effort on the part of the defendants in this suit to 'siphon' off the assets of API to other entities, more particularly the fourth, fifth and sixth defendants. Sankar and Epeli appear to be nominee directors in the sixth defendant to facilitate this arrangement. I have explained in some detail at various stages why I have so concluded and found.

**[92]** This systematic scheme or strategy for the removal or siphoning off of API's assets could not have been effected without considerable planning, arrangement and consensus on the part of the chief actors involved, namely Sarina, Kelvin Rajoo and Sharmilee. Edison de' Cruz may or may not have played a central role. As he is not a party to this action and has not been heard, his role is not directly relevant for the purposes of this action. How is the element of agreement or consensus in the tort of unlawful means conspiracy ascertained?

## THE LAW RELATING TO CONSPIRACY TO INJURE

**[93]** In *Clerk & Lindsell on Torts*, (18th Ed), at chapter 24 the author states in relation to the element of 'agreement' as follows:

> … Of the various words used to describe a conspiracy, 'combination' has been preferred on the ground that 'agreement' might be thought to require some agreement of a contractual kind, whereas all that is needed is a combination and common intention, (see *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393. But judicial descriptions still speak of 'concerted action taken pursuant to agreement' … But there must be a combination; lack of overt acts or an uncommunicated intention to join a conspiracy may show there has not been an effective combination … A company, being a separate legal person can conspire with its directors; and the knowledge of the company may be found in the person (Usually a director) who has management control (as its alter ego) for the transaction or act in question …

**[94]** From the foregoing passage it is evident that it is not necessary that evidence of any form of contractual agreement be produced. It is sufficient that there is evidence produced that the defendants acted in combination, which is the case here. I have set out in this judgment in relation to each of the defendants why I have concluded that they acted in combination and with common intention.

**[95]** I therefore find that:

(a) Sarina, Kelvin and Sharmilee did in fact consensually act in combination and thereby conspire to remove the assets of API to other entities; and

(b) they succeeded in so effecting the transfer of API's assets, namely its car park operations amounting to no less than 16 car parks to, inter alia, the fourth, fifth and sixth defendants.

**[96]** In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32 the Court of Appeal had occasion to consider the salient features of a claim founded on the tort of conspiracy. They quoted, inter alia, from The Common Law Library relating to Precedents of Pleadings:

> … The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v Vibart* [1963] 1 QB 234, *affirmed* [1963] 1 QB 528). Pleading. The statement of claim should describe who the several parties and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy and it must then proceed to set forth, with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy, and lastly, it must allege the injury and damages occasioned to the plaintiff thereby (The Common Law Library — No 5 – Precedents of Pleadings — s 26 – Conspiracy) …

**[97]** In their statement of claim the plaintiff comply substantially with the

foregoing in that they have described the parties, their relationship with each other, the conspiracy with particulars, the purpose of the conspiracy and finally the damage suffered by the plaintiff as a consequence, with particulars. While no specific agreement is pleaded, it is evident from the pleadings that the parties, ie the defendants, particularly the first, second and third defendants acted in combination and with common intention to effect the transfer of assets of API to the corporate entities they controlled in the form of the fourth, fifth and the sixth defendants. The plaintiff pleads that at or around the time that API was facing liquidation and soon thereafter, namely from about July 2009 onwards, the defendants and each of them acted in concert and in conspiracy with each other, committed fraud and perpetrated the fraud against the plaintiff to deny the plaintiff its legitimate claims for the repurchase of the shares in API and the 10% profit which had been outstanding since 2005. The timing pleaded is not strictly accurate as the evidence bears out the fact that such siphoning and transfer of API's assets commenced from the time when it was foreseen that API was going insolvent, sometime in 2008. However this in itself does not vitiate or affect the claim because the details pertaining to the transfer of assets was solely within the knowledge and purview of the defendants. They produced the details of this evidence at trial themselves. The fact therefore that the claim pleads a date from 2009 cannot detract from the fact that a scheme existed and was put into effect by these defendants from 2008 or so.

**[98]** In relation to the conspiracy to injure the plaintiff contends that the conspiracy between the defendants was to commit unlawful acts so as to deny the plaintiff its rights in relation to those assets and which therefore caused damage to the plaintiff. Alternatively the plaintiff contends that the conspiracy was to do a series of acts using the API related companies to siphon off the business and revenues of API which, if lawful, were done with the predominant intention of causing damage to the plaintiff.

**[99]** In short, from the foregoing, it appears that the plaintiff has pleaded a cause of action in conspiracy based on unlawful means conspiracy and alternatively lawful means conspiracy.

**[100]** How is the tort of conspiracy defined? In the Singapore High Court decision of *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR 451 Andrew Phang Boon Leong J dealt with this issue in some depth. I respectfully adopt the definition set out by the learned judge thus:

> … It is apposite to note that the actual principles of law relating to the tort of conspiracy are none too clear. What is clear is that there are, traditionally, two separate and distinct aspects or ways of applying the tort of conspiracy. As might have been surmised the legal principles with respect to each aspect are somewhat

different. There is, first, the situation where unlawful means have been used (also known as 'wrongful means conspiracy'). The relevant law in this context appears to be straightforward. In particular, there is no need for the plaintiff concerned to prove that there has been a predominant intention on the part of the defendants to injure it. It would appear that the very utilisation of unlawful means is, by its very nature, sufficient to render the defendants liable, regardless of their predominant intention. This would appear to be both logical as well as just and fair, especially if we bear in mind the fact that the central core, as it were, of the trot of conspiracy hinges on the proof that the conspiracy is somehow unlawful and that the plaintiff is entitled to succeed provided that it can prove that it has suffered damage.

Secondly, there is the situation where lawful means have been used (also known as 'simple conspiracy' or 'conspiracy to injure'). Unlike the first category referred to briefly in the preceding paragraph, this second category requires that the plaintiff prove that there has been a predominant intention on the part of the defendants to injure it (see the leading House of Lords decision of *Lornho pic v Fayed* [1992] 1 AC 448 ('Lornho'). This additional element is required simply because, without it, the alleged conspiracy would be devoid of any element of unlawfulness. It is precisely because there is a predominant intention on the part of the defendants to injure the plaintiff that the plaintiff is entitled to succeed provided (again) that it (the plaintiff) can prove that it has suffered damage. It is this concerted predominant intention to injure that renders the conduct of the defendants, which would otherwise have been lawful, unlawful or illegitimate. As Lord Bridge of Harwich who delivered the substantive judgment of the House in *Lornho* (with which the other law Lords agreed), observed (at pp 465–466):

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortuous. *But when the conspirators intentionally injure the plaintiff and use unlawful means to do so. it is no defence for them to show that their primary purpose was to protect their own interests; it is sufficient to make their action tortuous that the means used were unlawful.* (Emphasis added.)

…

**[101]** It is clear from the above exposition that the category of tort pleaded must be clear. In the instant case the plaintiff has founded its claim on unlawful means conspiracy and in the alternative pleaded lawful means conspiracy. Two key features distinguish these two categories of the tort. In lawful means conspiracy it is necessary for the conspirators to have acted with the predominant purpose of causing injury to the plaintiff. In unlawful means conspiracy this additional factor does not have to be satisfied.

**[102]** In the instant case the plaintiff points to the switching or siphoning of the assets and business of API to the fourth, fifth and sixth defendants at the behest of the first, second and third defendants who are alleged to have

conspired together to achieve the same. This, it is contended, amounts to an unlawful act, given the fact that these parties had foreseen the imminent liquidation of API and again post-liquidation, thus giving rise to unlawful acts on the part of these defendants in transferring or channelling API's assets to other related entities.

**[103]** In *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR 80 Judith Prakash J held that in order for a claim of conspiracy to succeed, the elements that have to be satisfied are the following:

(a) a combination of two or more persons and an agreement between and amongst them to do certain acts;

(b) if the conspiracy involves lawful acts, then the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff but if the conspiracy involves unlawful means, then such predominant intention is not required;

(c) the acts must actually be performed in furtherance of the agreement; and

(d) damage must be suffered by the plaintiff …

**[104]** And in *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd* [2002] 4 SLR 537 Lai Kew Chai J relied on the English case of *Kuwait Oil Tanker Co SAK and another v Al Bader and others* [2000] 2 All ER (Comm) 271 where it was stated:

> A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful actions taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.

**[105]** The question that falls to be considered is whether, given the findings of the court above, the plaintiff has succeeded in establishing conspiracy by unlawful means, which is the primary tort pleaded. It is only in the alternative that the plaintiff has pleaded lawful means conspiracy.

**[106]** I have concluded above that the first, second and third defendants acted in concert to cause the siphoning off or transfer of the assets and business of API to the fourth, fifth and sixth defendants, which were vehicles to house the assets of API. API was in financial difficulties and on the point of liquidation when these businesses were transferred. Where, it may be asked, is proof of the agreement or combination between Sarina, Kelvin Rajoo and Sharmilee de' Cruz for the transfer of the business and assets of API to the other defendants? Proof of such agreement is to be inferred from the net result of their concerted activities over the relevant period. These three defendants were

directors and shareholders who worked closely together and with Edison de' Cruz in API and the Stess group of companies. The evidence discloses that they were interchangeably shareholders and/or directors in the stable of companies that were controlled by them and Edison de' Cruz. A finding was also made that these companies functioned seamlessly as one unit, based on the manner in which business was conducted. The transfer of the assets of API, primarily car park businesses, was effected to the fourth, fifth and sixth defendants by way of corporate exercises and what purported to be a sale of shares. These transactions could not have been effected without prior arrangement and consensus between these three defendants. In other words the circumstantial evidence, as I have outlined it in full above, is overwhelming. It is sufficient to enable this court to infer that these defendants acted together and in concert in the transfer of the subject assets of API to the other entities which they too controlled. For these defendants to act together and in concert it is necessary that their concerted unlawful actions were taken pursuant to an agreement made between them. It would be futile to search for an express admission of the subsistence of any such 'agreement'. Indeed co-conspirators are hardly likely to leave behind a documentary trail to enable the detection of such agreement. If indeed such express evidence was required then it would not be possible to prove the occurrence of such a tort. The reality is that the court must look to the evidence of their overt acts and the net result of their concomitant actions over the requisite period of time to ascertain whether such an agreement existed or did not. It is my finding that such an agreement did in fact subsist. It is to be inferred from the chronology of events which disclose that the assets of API were systematically removed over time through various transactions, stated to be arms' length, but which were not, to other entities, namely the fourth, fifth and sixth defendants, which were entities controlled by the same persons as those who controlled API, namely the first and second defendants and indirectly, the third defendant.

**[107]** Where then are the unlawful actions on the part of these defendants which is an essential element in the unlawful means conspiracy tort? The unlawful actions are clearly evident and apparent from the fact that assets of a near insolvent or insolvent company were transferred out before and after the presentation of a winding up petition against it, during winding up and thereafter, thereby diverting assets that should have been lawfully available for division and distribution between the general body of creditors, secured and unsecured. Instead of which, these income generating assets, namely the operation of no less than 16 car park businesses have effectively been diverted to the fourth, fifth and sixth defendants where they continue to be operated and run by the same persons, namely the first, second and third defendants. The liquidation of API has therefore not affected the core businesses of API which continue to be run by the same people through other entities namely the fourth, fifth and sixth defendants. There can be no clearer evidence of a diverting of assets and businesses.

**[108]** With respect to the sixth defendant it may well be contended that as Sankar and Epeli appear to be the new shareholders and directors, it is not involved. However for the reasons which I have enunciated above in relation to the Dataran Merdeka sale of the lease and my findings in respect of Sankar's evidence, it appears to this court that they are merely nominees for the same group of persons, namely the first, second and third defendants.

**[109]** Taken as a whole, therefore, the unlawful acts of these defendants include what appears to amount to a dealing with the assets of an insolvent company, namely API. There could well be contraventions of the Companies Act 1965 which require investigation by the Official Receiver in relation to, inter alia, ss 223, 233 and 295 of the Companies Act 1965. In possible contravention of these (and possibly other sections) of the Companies Act, the assets of API were diverted conveniently to the fourth, fifth and sixth defendants to enable the first, second and third defendants to continue to conduct the operations of these car parks and enjoy the income there from without accounting to the liquidator or the creditors of API. Instead of the liquidator of API continuing to run the car park businesses that it had operated for several years, these assets were systematically removed over a period of approximately one and a half to two years prior to insolvency and after API was wound up, thereby putting API's assets out of the creditors' reach, including the plaintiff.

**[110]** The plaintiff is a shareholder of API. However it is also an unsecured creditor of API that suffers damage and injury as a consequence of the wrongful or unlawful transfer of the assets of API to the other related entities. Given that unlawful means were utilised, it is not necessary for the plaintiff to prove that it was the predominant purpose of the defendants to injure or defraud the plaintiff. The fact that the defendants were acting primarily in their own interests is also irrelevant. It is sufficient for the plaintiff to prove that he has in fact suffered injury and damage. This the plaintiff has done. It has tendered clear evidence that it never received the profits from the agreement entered into for the receipt of the profits of API from 2005. There is therefore a debt due and owing from API to the plaintiff. This makes the plaintiff a creditor who has been deprived of the benefit of the assets of API which have been diverted to the benefit of the first, second and third defendants through the fourth, fifth and sixth defendants.

**[111]** It has been submitted by learned counsel for the defendants that in the instant case the burden of proof is on the plaintiff and the standard of proof is beyond reasonable doubt as the cause of action lies in conspiracy and fraud. A perusal of the pleadings and the prosecution and defence of this case however discloses that the cause of action here is premised on the tort of conspiracy to injure, more specifically conspiracy to injure by unlawful means. This tort does

not require proof beyond reasonable doubt. As is the case in other civil tortuous claims, the standard of proof is on a balance of probabilities. In other words if the plaintiff can show on a balance of probabilities that the various requisite elements in the cause of action have been made out, then it has proved its claim. If it fails to establish any one of the elements then it will fail.

**[112]** What then is the damage and loss suffered by the plaintiff? In the instant case it will be recalled that the plaintiff invested funds as working capital for API which was equivalent to 10% of the equity in API. It was further agreed that the profit sharing ratio in favour of the plaintiff was 25% while 75% of the profits were to go to API. There was a further profit guarantee of RM180,000pa or 25% of the profits whichever was the higher. In the event of default in this investment it was further agreed that the entire sum of RM1.2m would be repayable to the plaintiff on demand. It therefore follows that as API failed to pay the plaintiff the profits due to it from the year 2005 together with a return of the working capital of RM1.2m together with interest notwithstanding demands to that effect, the plaintiff has suffered loss and damage.

**[113]** The defendants point to the other civil suit initiated by the plaintiff against Edison de' Cruz and API in D-3–22–1492 of 2006, stating that there is duplicity, and that the filing of this action amounts to an abuse of process. They point to the fact that the relief sought by the plaintiff is the same in that suit.

**[114]** However this contention does not appear tenable because in the instant suit the plaintiff founds its claim in unlawful means conspiracy against six defendants other than Edison de' Cruz and API. The cause of action and the defendants are different. While the loss suffered and claimed may be similar, this does not preclude the plaintiff from prosecuting different causes of action against different defendants. What the plaintiff is precluded from doing is obtaining double recovery in respect of the same loss against the defendants severally in both suits.

**[115]** That is not the case here. In the instant case the plaintiff seeks damages for unlawful means conspiracy, such damages being equivalent to an account of the profits due to it from API since 2005 together with a return of the working capital. Even if the relief accorded in the other civil suit is similar or identical, this does not preclude the plaintiff from prosecuting to judgment the claim against these other defendants provided it proves its claim. The issue of duplicity of actions does not therefore arise.

SECTION 67 OF THE COMPANIES ACT 1965

**[116]** Learned counsel for the first, fourth and fifth defendants submits that

the agreement between API and the plaintiff whereby the plaintiff invested a sum of RM1.2m in API is void for a contravention of s 67 of the Companies Act 1965. The section provides as follows:

> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.

**[117]** As outlined above, the agreement between the plaintiff and API was for the investment of working capital in return for which the plaintiff was to gain profits and a return of investment from the business of the operation of car parks. In the event the scheme or project was unsuccessful, the plaintiff was assured of a return of its working capital with interest. In these circumstances it is difficult to appreciate how s 67 applies …

**[118]** A useful exposition on the history of s 76 of the Singapore Companies Act 1965 was considered in the case of *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd and others*. Although the Singapore s 76 is not identical and contains considerably longer provisions, Andrew Phang J in considering the history of the section touched on the underlying rationale for this section, which underlying rationale applies equally to our s 67:

> … Indeed s 76 of the Act was rather more modest in length prior to the numerous amendments that have been effected over a great many years to it. This underscores the basic point that the spirit and intent of s 76 is not to constitute an impediment to the legitimate trade and commerce that constitutes the lifeblood of any and every company. Indeed, the basic thrust of the Act is the precise opposite. To this end, there have been numerous amendments to s 76 precisely in order to ensure that this particular provision does not constitute an impediment to trade and commerce. In other words, this particular provision has been amended meticulously in order to ensure that commercial realities are not only recognised but also given effect to …
>
> …
>
> … In a leading local treatise, it has been 'suggested that the mischief that the section (viz, s 76 of the Act) is aimed at is the improper depletion of a company's assets to the detriment of its creditors' (see *Walter Woon & Andrew Hicks, the Companies Act of Singapore — An Annotation* Vol 1 (LexisNexis, 2004) ('Woon & Hicks') at paras 2609–2625).
>
> Again another learned author in this field has recently observed thus (see Catherine Roberts, *Financial Assistance for the Acquisition of Shares* (Oxford University Press, 2005) ('Roberts') at para 1.01):
>
> > This rule against financial assistance for the acquisition of shares has links with a fundamental principle at the core of company Law, namely maintenance of

> capital. The rule can be seen as a method by which a company's capital is maintained for the protection of the company's creditors, and a company's assets are protected against misuse and dissipation by directors and controlling shareholders.

In the judicial context, Arden LJ observed in the recent English Court of Appeal decision of *Shaston v SWP group plc* [2003] BCLC 675 (Chaston) thus:

> The general mischief however, remains the same, namely that the resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition. This may prejudice the interests of the creditors of the target or its group and the interests of any shareholders who do not accept the offer to acquire their share to whom the offer is not made.

And, in the English Court of Appeal decision of *In re VGM Holdings Limited* [1942] 1 Ch 235, Lord Greene MR (with whom Luxmorre and Goddard LJJ agreed), referring to the UK predecessor of s 76 of the Act observed thus (at p 239):

> Those whose memories enable them to recall what had been happening after the last war (ie world war two for several years will remember that a very common form of transaction in connection with companies was one by which persons — call them financiers, speculators, or what you will — finding a company with a substantial cash balance or easily realisable assets such as war loan, bought up the whole or the greater part of the shares of the company for cash and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realisation of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals. I think that it is not illegitimate to bear in mind that notorious practice in considering the ambit of the section.

The passage just quoted is, it is suggested of more than passing significance simply because it gives us the original historical perspective centring on the promulgation of the UK precursor of s 76 of the Act. It is true that the methods of contravening s 76 of the Act have naturally (and unfortunately) become more subtle and sophisticated in the intervening period. However, it is equally true that *s 76 of the Act was never intended to 'capture' transactions by a company which were entered into bona fide in the commercial interests of the company itself (as opposed to providing, in substance if not form, financial assistance for the purchase of the company's own shares). It is this underlying spirit that the above quotation serves to underscore …* (Emphasis added.)

**[119]** In the instant case, no monies were borrowed by the plaintiff to purchase the shares of API. In other words, no loan was effected by the company, API to the plaintiff to facilitate the purchase of 25% of the equity for RM1.2m. Therefore s 67 of the Companies Act 1965 does not come into play.

**[120]** Further there is no question of API dealing in its own shares because it will be recalled that the plaintiff purchased its 10% shareholding from Stess Sdn Bhd. The monies for those shares were also paid to Stess Sdn Bhd. It was

only the agreement of 18 March 2004 that stipulated that the agreement was between API and the plaintiff. The reality was that the transaction was undertaken between Stess and the plaintiff. Section 67 is therefore inapplicable in under these circumstances as no question of dealing in its own shares arises.

**[121]** As for the term in the agreement whereby API agreed to repurchase the 10% equity in the event of several events of default, this does not amount to a loan nor guarantee for a loan nor collateral for a loan. Neither does it amount to a reduction in capital attracting s 67 of the Act. Even if s 67 were applicable in this context, given the purpose for which the section was introduced, and the rationale explained above, it would follow that the present transaction involving the plaintiff and API would not fall to be 'captured' by the section. It is, as is evident from the history and chronology of events between the parties, a bona fide commercial transaction. It does not in either form or substance amount to the provision of financial assistance for the purchase of API's own shares. This is evident from the fact (not disputed) that the plaintiff paid RM1.2m of its own monies for the purchase of API shares and was given a receipt for the same. The terms on default do not amount to a guarantee or collateral. It therefore appears to this court that s 67 of the Companies Act 1965 does not come into play in this case and accordingly the transaction between the plaintiff and API is not void.

THE PLAINTIFF CANNOT USURP THE ROLE OF THE LIQUIDATOR?

**[122]** The defendants argued strenuously that even if this court accepted that the assets of API had indeed been siphoned off, or transferred out and channelled to other related entities as suggested by the plaintiff (which they denied), then such transfers, even if unlawful, could only be acted upon by the liquidator. The plaintiff, they maintained, as shareholder, had no locus or standing in these matters. Only the liquidator could prosecute the relevant parties under the relevant provisions of the Companies Act 1965.

**[123]** Having considered this contention it appears to this court that the purpose of establishing whether or not unlawful acts in relation to the Companies Act were indeed carried out by these defendants, was solely for the purpose of ascertaining whether one of the key elements in the tort of unlawful means conspiracy had been established. The plaintiff is not seeking to usurp the position of the liquidator and recover the assets that have been transferred to other entities for the general benefit of the body of creditors. That is something which is to be undertaken by the liquidator. However the plaintiff here points to those unlawful acts, namely the systematic transfer and channelling of the assets of a near insolvent company to other related entities to enable the

continued running of the business by the same directors and shareholders, for the purpose of establishing the tort of conspiracy.

**[124]** It is sufficient for this cause of action that the plaintiff establish that the defendants have been undertaking unlawful or illegal activities. It is not in a position to take either corrective or punitive action on that front. However it is entitled, under this cause of action, to point to those unlawful actions, which taken together with the elements of combination and damage suffered, to maintain that the cause of action of unlawful means conspiracy has been established, warranting the grant of damages in his favour. This the plaintiff has done.

**[125]** Accordingly the defendants' contention of a lack of locus to raise these issues is not tenable.

CONCLUSION

**[126]** Having considered the entirety of the evidence and having heard comprehensive submissions from learned counsel for the plaintiff and the defendants, I conclude for the reasons cited above that the plaintiff has proved its case on a balance of probabilities. It is therefore entitled to damages and interest to be assessed and I so order. Judgment is granted to the plaintiff on terms as prayed for in the statement of claim.

*Claim allowed.*

Reported by Ashok Kumar